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IN THE

Supreme Court of the United States

October Term, A. D. 1967

No. [redacted] 15

CHEMICAL TANK LINES, INC., a corporation, *Appellant*

v.

EDWARD W. HOLSTINE, *Appellee*

ON APPEAL FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRIEF OF APPELLEE IN SUPPORT OF MOTION TO DISMISS THE APPEAL AND TO AFFIRM THE JUDGMENT BELOW.

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v.

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ON APPEAL FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRIEF OF APPELLEE IN SUPPORT OF MOTION TO DISMISS THE APPEAL AND TO AFFIRM THE JUDGMENT BELOW.

(Appendix herein referred to is Appendix to Motion to Dismiss)

CHRONOLOGICAL STATEMENT OF FACTS

On November 12, 1965, the Appellee, Edward W. Holstine, obtained a judgment on a jury verdict against Appellant, Chemical Tank Lines, Inc., a corporation, in the Court of Common Pleas of Kanawha County, West Virginia, for $350,000.00. The Appellant made certain motions for a judgment under West Virginia Civil Rules of Procedure, Rule 50-B, which is equivalent to a motion *non obstante veredicto*, and a motion to set aside the verdict and grant it a new trial, both of which were overruled by the trial court, and a judgment was entered on the verdict on the 12th day of November, 1965. Thereafter, the Appellant

filed its petition with supporting brief in the Circuit Court of Kanawha County, West Virginia, asking for a writ of error to or appeal from the judgment of the Court of Common Pleas of Kanawha County, West Virginia. (An appeal or writ of error must be sought in the Circuit Court of Kanawha County from the Court of Common Pleas of Kanawha County, West Virginia, before application for writ of error or appeal can be made in the Supreme Court of West Virginia). On May 10, 1967, the Circuit Court of Kanawha County, West Virginia, after mature consideration, rendered its written opinion and refused to grant Appellant the writ of error or appeal sought by it for the reason that the judgment complained of was "plainly right", but on Appellant's motion, granted it a stay of execution to the judgment of the Court of Common Pleas for a period of 60 days to allow the Appellant to file its application in the Supreme Court of Appeals of West Virginia for an appeal or writ of error, provided, and on condition that the Appellant execute and file a suspending bond with the Clerk of the Circuit Court in the penalty of $5,000.00, conditioned to pay "all such damages as any person may sustain by reason of said suspension in case an appeal or writ of error to such judgment shall not be allowed and be effective within the specified time." This was not a bond to pay Appellee's costs in the Supreme Court, for the Appellant, on its application in the Supreme Court, might not be granted an appeal or writ of error. A copy of said order of the Circuit Court of Kanawha County, West Virginia, dated May 10, 1967, is found in Appendix, p. 1(a). A copy of the bond required by such order is found in Appendix, p. 2(a)-3(a).

Thereafter, on June 27, 1967, Appellant presented to the Supreme Court of Appeals of West Virginia its petition praying for an appeal from and supersedeas to the judgment of the Circuit Court of Kanawha County, West Virginia, rendered on the 10th day of May, 1967. The petition is styled "Petition for Appeal or Writ of Error, and Supersedeas." The prayer of the petition asks that "it be awarded an Appeal, if such be proper, or a Writ of Error, if such be proper, and in either event, be granted a Supersedeas to the judgment below." Pertinent parts of the petition are found in Appendix, p. 6(a).

Thereafter, on September 11, 1967, and after inspecting the petition and argument in support thereof, the Supreme Court of Appeals granted the appeal and supersedeas prayed for, but it was not to take effect until the petitioner had given bond before the Clerk of the Circuit Court of Kanawha County in the penalty of $500,000.00, conditioned according to law. A full copy of this order is contained in Appendix, p. 6(a)-7(a). The statute of West Virginia, Chapter 58, Article 5, Section 16, and the Rules of the Supreme Court of Appeals of West Virginia, Rule III, Section 3, both require that the bond must be given within two months from the date the appeal and supersedeas is granted or the appeal shall be dismissed. Both under the statute and the Supreme Court Rule the dismissal of the appeal is mandatory if the bond required by the order is not given within the two months period. (November 11, 1967, would be the last day of the two months period when bond could be given). No bond was given during that period. The condition of this bond is found in Chapter 58,

Article 5, Section 14, of the Code of West Virginia. Appendix, p. 12(a).

On November 3, 1967, counsel for Appellee served notice on counsel for the Appellant that on November 14, 1967, a motion would be filed in the Supreme Court of Appeals of West Virginia to dismiss the appeal previously awarded the Appellant as having been improvidently awarded on September 11, 1967, on the grounds that the Appellant did not file its petition for writ of error or appeal in the Supreme Court of Appeals of West Virginia within the time allowed by law, and that the Appellant did not have its bill of exceptions or certificates in lieu thereof properly filed within the time provided by law, and, therefore, the Court was without jurisdiction to grant said appeal or writ of error. On November 14, 1967, pursuant to his notice of November 3, 1967 to Appellant, Appellee filed his motion to dismiss the appeal as having been improvidently awarded on the grounds aforesaid and filed his brief in support thereof. On the same date, the Appellant filed its brief in opposition to that motion.

On November 28, 1967, Appellant had not given its appeal bond as required by the order of the Supreme Court of Appeals of West Virginia of September 11, 1967, and by the statute of West Virginia, Chapter 58, Article 5, Section 16, and the Rules of Practice of the Supreme Court, Rule III, Section 3. The Appellee, on that date, filed his notice and motion to dismiss the appeal and supersedeas previously allowed the Appellant by the Supreme Court of Appeals of West Virginia by its order of September 11, 1967, for the failure of the Appellant to give its bond in

the penalty of $500,000.00 within the two months period as required by said order, said statute and Rule of the Supreme Court. On November 29, 1967, the Appellant filed with the Circuit Court of Kanawha County, West Virginia, its bond in the penalty of $500,000.00, which was 18 days after it was required to be filed by the statute, Rule of the Supreme Court and order of September 11, 1967 of the Supreme Court.

With extensive briefs having been filed, counsel for Appellant and Appellee, on March 19, 1968, orally argued both motions of Appellee, (1) to dismiss the appeal on the grounds that the Appellant did not file its application for appeal in the Supreme Court within the time allowed by law, and did not have its bill of exceptions or certificates in lieu thereof properly filed within the time provided by law, and, (2) to dismiss the appeal on the ground that the Appellant had not filed its bond required by the Court's order of September 11, 1967, within the two months period required by the statute and the Rules of the Court. Time was allowed both counsel for full argument on both these motions to dismiss the appeal as improvidently awarded.

On March 20, 1968, the Supreme Court of Appeals sustained the motion of the Appellee filed on November 28, 1967, to dismiss the appeal and supersedeas on the ground that the Appellant had not given the bond as fixed by the Supreme Court in its order of September 11, 1967, within the two months period as required by statute and the Rules of Practice of the Supreme Court, but the Supreme Court did not, because it was unnecessary to, consider any of the other motions of

the Appellee theretofore filed to dismiss the appeal and supersedeas as improvidently awarded, which order is in Appendix A, page 1-a, Jurisdictional Statement.

APPELLEE'S REPLY TO APPELLANT'S STATEMENTS THAT THE "QUESTIONS ARE SUBSTANTIAL"

It is asserted on page 15 of Appellant's brief that "Article 8, Section 1 of the Constitution of West Virginia provides that judicial powers of the State shall be vested in the Supreme Court of Appeals to consider a case in which it had already granted the right to have it so determined by the awarding of the Writ of Appeal". Article VIII, Section 1 of the Constitution* makes no such provision. It is as follows:

> "1. The judicial power of the State shall be vested in a supreme court of appeals, in circuit courts and the judges thereof, in such inferior tribunals as are herein authorized and in justices of the peace."

The scope of the jurisdiction of the Supreme Court of Appeals of West Virginia is provided in Article VIII, Section 3 of the Constitution*:

> "3. It shall have original jurisdiction in cases of habeas corpus, mandamus, and prohibition. It shall have appellate jurisdiction in civil cases where the matter in controversy, exclusive of costs, is of greater value or amount than one hundred dollars; in controversies concerning the title or boundaries of land, the probate of wills, the appointment or qualification of a personal representative, guardian, committee or curator, or concerning a mill, road, way, ferry or landing; or the right of a corporation or county to levy tolls or taxes; and, also, in case of quo war-

*Michie's West Virginia Code, Volume 1.

ranto, habeas corpus, mandamus, certiorari, and prohibition, and in cases involving freedom or the constitutionality of a law."

The West Virginia statute (Code 58-5-16) takes nothing away from either Section 1 or Section 3 of Article VIII of the West Virginia Constitution*. It merely provides the time in which an applicant may present his appeal and the time in which he may give any bond required. Earlier statutes allowed longer periods of time. The case of *N &W Railway* v. *County Court*, 123 W. Va. 461, 15 S. E. 2d, 574, sustains the position of Appellee and not of Appellant.

Appellant's contention in this appeal as set out on pages 18 and 19 of its Jurisdictional Statement is based upon the alleged premise that the appeal and supersedeas granted by the Supreme Court of West Virginia on September 11, 1967, were two separate and distinct things—one, the appeal, and the other a supersedeas; that the bond given in the Circuit Court of Kanawha County, West Virginia, on May 10, 1967, for $5,000.00 was to act as an appeal bond in the Supreme Court for costs in the Supreme Court appeal. The recitals in the order of the Supreme Court of September 11, 1967, designated that the appeal was not separate from the writ of supersedeas, but that they were one writ and required one bond. See Appendix, p. 6(a)-7(a). The recital in the order of the Circuit Court of May 10, 1967, designated a stay of execution bond to stay the execution on its order, and the bond actually given in the penalty of $5,000.00 was conditioned to pay "all such damages as any

*Michie's West Virginia Code, Volume 1.

person may sustain by reason of said suspension in case an appeal or writ of error to such judgment shall not be allowed and be effective within the specified time." A full copy of this bond is found in Appendix, p. 2(a)-3(a). The Supreme Court fixes the condition and penalties of the bonds required by it, and the Circuit Court of Kanawha County fixed the conditions and penalties of the bonds required by it. They are separate courts.

Appellant knew of the condition of the provisions of the order of the Circuit Court of Kanawha County of May 10, 1967, for its counsel signed it. It likewise knew the condition of the bond executed on May 10, 1967, in the penalty of $5,000.00, for its counsel signed the bond for it. These undisputed facts remove the basis upon which the Appellant relies for this appeal.

The Appellant, on page 19 of Appellant's Jurisdictional Statement, states that "The giving of a bond for costs by Appellant on May 10, 1967, was sufficient here to act as an appeal bond, because the amount of $5,000 was adequate." The condition of that bond was to do no more and no less than its terms, and only required the payment of damages as any person might sustain by reason of the suspension of the Court's order in case an appeal or writ of error was not allowed. The instant the appeal was allowed by the Supreme Court, the conditions of that bond were fulfilled and by its very terms became null and void and there could be no liability thereon. Without any bond having been given, whether for appeal, for costs, or appeal with supersedeas, within the time provided by the statute and Rules of the Supreme Court, on motion, that appeal would be dismissed and the Ap-

pellee would have no action on the $5,000.00 bond even if the appeal was for appeal only and without supersedeas. If the judgment of the court below was affirmed and the Appellee was awarded his costs, he would have no action on the $5,000.00 bond given in the Circuit Court on May 10, 1967, for that bond was not so conditioned.

The appeal to this Court under 28 U.S.C.A. 1257(2) then resolves itself as to whether a party litigant, regardless of the questions involved, whether Federal or State, or the Constitution of either, can complain to this Court if he has not complied with the statutes and rules of the state court, both as to the time within which he has to make his application to the state court for an appeal, and the time within which he has to give any bond required by the state court. The Supreme Court of the United States, as well as Circuit Courts of Appeal, has dismissed appeals, after the appeal has been granted, for the failure of the appellant to give the bond within the required time, even though an appeal to the Circuit Court of Appeals from a District Court is a matter of right if done within the time permitted, and no Federal Constitutional provision is violated. See, for example, *Killian* v. *Clark*, 111 U. S. 776 (1884).

The Supreme Court of the United States in *John* v. *Paullin*, 231 U. S. 583, 58 L. ed. 381, held, syllabus 2:

> "The state laws and practice relative to the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise, are no less applicable when Federal rights are in con-

troversy than when the case turns entirely upon questions of local or general law."

In the body of the opinion, it is stated (L. ed., page 382):

> "As the supreme court of the state did not pass upon the merits of the case or upon the correctness of any of the rulings below, but, on the contrary, held that it was powerless to do so because its appellate jurisdiction was not invoked in accordance with the laws of the state, we do not perceive any theory upon which its judgment of dismissal may be reviewed by us consistently with the familiar limitations upon our authority. (Citing statutes and cases). Certainly no Federal right was denied by that court, and if, as was held by it, its appellate jurisdiction was not properly invoked, no Federal question was before it for decision.
>
> "Without any doubt it rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon question of local or general law." (Citing numerous Supreme Court decisions).

In order to perfect the appeal, the bond or undertaking must be filed within the time limited by statute, court rule, or court order. In Volume 4A, C. J. S., Appeal & Error, Section 565, it is stated:

> "In order to perfect the appeal, as a general rule the bond or undertaking must be filed within the time prescribed by statute or rule of court,

> or fixed by the order of the court granting the appeal, or within the time fixed for perfecting the appeal; and if it is not filed in time the appeal will be dismissed, * * *."

Numerous cases from many states of the Union are cited in support of this statement. Statutory requirement is mandatory and jurisdictional, and cannot be waived. 4A, *C. J. S.*, 572.

The Supreme Court of West Virginia has held the provisions of Chapter 58, Article 5, Section 16, as to the time in which the appeal is to be made and the time within which the bond is to be given to be mandatory and are conditioned upon which any appeal is to be awarded and, therefore, jurisdictional.

In *Scott* v. *Coal & Coke Railway Co.*, 70 W. Va. 777, 74 S. E. 992 (1912), the syllabus of which held, as is stated in the syllabus:

"APPEAL AND ERROR—Dismissal—Failure to Perfect Proceedings.

> "Failure to perfect an appeal, writ of error or *supersedeas* by giving the bond required by law and the order of the court or judge, awarding it, within one year and two months from the date of the judgment, decree or order involved, makes it the mandatory duty of the appellate court, under section 17 of chapter 135 of the Code, to dismiss the appeal, writ of error or *supersedeas*, although the bond has been given after the expiration of such period."

The only difference between the statute under which that case was decided and the present statute is the

change of the time limit. Whether the bond is a supersedeas, appeal or cost bond, the present Code of West Virginia (Chapter 58, Article 5 Sections 14 and 16) provides for an appeal bond, and the Court of September 11, 1967, directed the giving of such bond within two months of September 11, 1967, the date the appeal was awarded, and the failure to do so deprives the Supreme Court of its jurisdiction to proceed further with the appeal.

A bond was given in the *Scott* case, but it was given after the appeal period expired and the Court dismissed the appeal because the bond, although in fact given, was given after the expiration of the time to file it. The Court stated on page 779 of W. Va. Reports and page 992 S. E. Reporter:

> "Strictly speaking, no appeal, writ of error or *supersedeas* exists, until the bond is given, in those cases in which bond is required. The statute says it shall not take effect until after the bond shall have been given. * * *. The plain design of the two sections here involved is to require the petition to be presented within one year from the date of the judgment, decree or order and allow two months additional time for performance of all additional things requisite to the transfer of the cause into the supreme court."

Scott v. *Coal & Coke Railway Co.* was approved in *State* v. *Legg*, 151 W. Va. 401, 151 S. E. 2d 215 (1966).

In *Casanova* v. *Kreusch*, 21 W. Va. 720 (1883), the Court held:

> "A writ of error and *supersedeas* having been dismissed because of the failure of the

> plaintiff in error to give a new bond with good and sufficient security, the sureties in the first bond being insolvent, the plaintiff in error cannot after such dismission of his writ of error be awarded a writ of error without *supersedeas* on giving the bond required by law, and if such writ of error has been granted it will be dismissed as improvidently awarded."

In that case the sureties on the supersedeas bond having become insolvent, and this fact being called to the Court's attention, on appellee's motion, the Court required the appellant to furnish a new bond with good security and ordered the plaintiff in error to execute such bond within sixty days before the trial court, and on its failure to do so, the writ of error and supersedeas theretofore awarded should stand dismissed from and after the expiration of the sixty day period. The plaintiff in error then moved the Court to modify its order so as to allow him a writ of error only without supersedeas, and this the Court refused to do, and the appeal was dismissed. The plaintiff in error then applied for a new writ of error but without supersedeas, which was granted, and fixed the bond for costs only. Appellee moved the Court to dismiss the new appeal as improvidently awarded, which was done.

Where an appeal has been granted on an application filed after the statutory time, the appeal, although granted by the Court, will be dismissed as improvidently awarded on motion of the appellee.*

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*Sothen v. Continental Assur. Co., 147 W. Va. 458, 128 S. E. 2d 458 (1962); Gaymont Fuel Co. v. Price, 138 W. Va. 930, 79 S. E. 2d 96 (1953).

The Commonwealth of Virginia follows the same general rule.

In Volume 1-B of Michie's Jurisprudence, Virginia and West Virginia (1967), under the heading "Appeal and Error," it is stated in Section 147:

> "The statutory requirements for appeal bonds have always been construed as mandatory. And failure to substantially comply with the statutory requirements applicable to appeal bonds constitutes a jurisdictional defect which cannot be corrected after the expiration of the time within which an appeal may be taken. Hence, the failure to give the required bond will result in the dismissal of the appeal, should the appellee move therefor."

Numerous cases, statutes and rules are cited in support of this statement.**

APPELLEE'S REPLY TO APPELLANT'S JURISDICTIONAL STATEMENT

We cannot accept as factual the statement of Appellant in its Jurisdictional Statement. The Supreme Court of Appeals of West Virginia on September 11, 1967, granted the Appellant an appeal and super-

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**Covington Virginian v. Woods, 182 Va. 538, 29 S. E. 2d 406 (1944); Ness v. Manuel, 187 Va. 209, 46 S. E. 2d 331 (1948); Parker v. Prince William County, 198 Va. 231, 93 S. E. 2d 136 (1956); Richardson v. Shank, 155 Va. 240, 154 S. E. 542 (1930); Smith v. Jewell Ridge Coal Corp., 203 Va. 499, 125 S. E. 2d 175 (1962); See § 8-489, Code of Virginia (1950); § 58-5-16, W. Va. Code; Rule 5:1, § 11, Sup. Ct. App. (Va.); Rules III, § 3, IV, § 13, Sup. Ct. App. (W. Va.); Phelps, Handbook of Virginia Rules of Appellate Procedure 133 (1964).

sedeas, which was one writ and not two as Appellant contends, but it was not to take effect until a bond was given by Appellant in the penalty of $500,000.00, and required the execution of that bond within two months from that date as required by Chapter 58, Article 5, Section 16, of Michie's Code of West Virginia, which provides as follows:

> "No process shall issue upon any appeal, writ of error or supersedeas allowed from or to a final judgment, decree or order, if, when the record is delivered to the clerk of the appellate court, eight months shall have elapsed since the date of such final judgment, decree or order; but the appeal, writ of error or supersedeas shall be dismissed whenever it appears that eight months have elapsed since such date before the record is delivered to such clerk, or that two months have elapsed since the date when the appeal, writ of error or supersedeas was granted before such bond is given as is required to be given before the appeal, writ of error or supersedeas takes effect."

And conditioned as required by Chapter 58, Article 5, Section 14, of the Code of West Virginia, to "abide by and perform the judgment * * * and to pay to the opposite party, and to any person injured all such costs and damages as they, or either of them, may incur or sustain by reason of said appeal, in case such judgment * * *, or such part, be affirmed, or the appeal * * * or supersedeas be dismissed, and also, to pay all damages, costs and fees, which may be awarded against or incurred by the appellant * * *."

The Appellant in its Jurisdictional Statement refers to the $500,000.00 bond as required by the Court to

be given by Appellant as a "supersedeas bond." The bond required by the Supreme Court of Appeals to be given was the one required by Chapter 58, Article 5, Section 14, of the Code of West Virginia, which was a combination appeal and supersedeas bond. The requirement was that one bond be given, not two bonds. But no bond was given by Appellant within the two months period required by Chapter 58, Article 5, Section 16, of the Code of West Virginia, or Rule III, Section 3, of the Rules of the Supreme Court of West Virginia.

APPELLEE'S REPLY TO QUESTIONS PRESENTED

1. Appellant again undertakes to assert that it was granted an appeal by the Supreme Court of Appeals of West Virginia, and having been granted an appeal, it was further granted a writ of supersedeas, when, as a matter of fact, as shown by the Court's order, Appellant was granted a conditional appeal and supersedeas, which was on condition that it, the appeal and supersedeas, jointly, not separately, was not to take effect until Appellant gave a bond with the Circuit Court of Kanawha County in the penalty of $500,000.00, conditioned according to law. The specific language of the Court order of September 11, 1967, is as follows: "(T)he appeal and supersedeas prayed for is granted, but it is not to take effect until the petitioner, or some person for it, shall have given before the Clerk of the Circuit Court of Kanawha County bond with good personal security in the penalty of FIVE HUNDRED THOUSAND Dollars, conditioned according to law." The word "it" in the Court's order refers to the appeal and supersedeas prayed

for. The order does not use the word "they", meaning appeal and supersedeas. There was but one writ asked for and one writ granted and one bond required and it was not given within the statutory time required by Chapter 58, Article 5, Section 16, of the Code of West Virginia, and the Rules of the Supreme Court of West Virginia, Rule III, Section 3. No appeal existed until the bond was given.

2. Appellant's statement under 2 that there was an agreement between counsel that the Appellant would not be required to file a bond is emphatically denied. No such agreement existed. Appellant's counsel, in his affidavit, says that such an agreement existed but the affidavits, four in number, of all counsel of the Appellee state specifically and categorically that there was no such agreement. The Supreme Court Rules require (Rule VII, Section 4) that: "All agreements of counsel in regard to any case or matter pending in court shall be reduced to writing, signed by counsel and delivered to the clerk." Any agreements of counsel with respect to a bond to be given within two months would likewise have to be reduced to writing and delivered to the clerk within the same two months period. If the agreement was to be in lieu of the bond, it would have to be delivered to the clerk before the expiration of the time in which the bond was to be given. Here, no agreement was ever made that the giving of the bond would be waived. The parties could not vary the Court order by agreement without the Court's consent, nor could they agree to alter the statutory provisions concerning bond.

Appellant relies on *Glus* v. *Brooklyn Eastern District Terminal*, 359 U. S. 231, 3 L. ed. 2d 770, 79 S. Ct.

760, that there was a waiving of the bond requirement. In that case there was no dispute that the defendant railroad had induced the plaintiff to delay his suit past the three year limitation. The allegation was made in the complaint and was not denied. It was on the defendant's motions to dismiss the complaint with the allegation that the defendant had fraudently induced the plaintiff to delay bringing his suit under the Federal Employers Liability Act until after the three year statute of limitations had run. The Court merely held that a statute of limitations can be waived on a proper showing amounting to fraud of one of the parties. The case was remanded to the trial court for a determination of "whether petitioner can in fact make out a case calling for application of the doctrine of estoppel."

In this appeal, the alleged agreement asserted by Appellant is disputed. The four affidavits filed by Appellee's counsel all emphatically deny that there was any agreement to waive the giving of bond. The purpose of the Rule (Rule VII, Section 4) requiring all agreements of counsel to be in writing and filed with the Clerk of the Court is to avoid any disputes between counsel and to require the Court to resolve such disputes. In cases brought before the Supreme Court of Appeals of West Virginia, that Court is not a trier of facts, but its jurisdiction and function is to determine if the trial court committed error in the trial. The trial court resolves disputes of fact. The Supreme Court of West Virginia resolves disputes of law.

The law of estoppel is not applicable in this appeal. If it was, it would apply against the Appellant. Pages

30 and 31 of Appellant's brief filed by it in the Supreme Court of West Virginia on December 21, 1967, are copied herein in Appendix, p. 6(a). Therein Appellant asserts that the premium on the $500,000.00 bond would cost $25,000.00. When Appellant's counsel, on November 3, 1967, was served with Appellee's motion to dismiss the appeal theretofore awarded, there still remained 8 days to November 11, 1967, for Appellant to file the required bond to perfect the appeal. Appellant, in its brief of December 21, 1967, (page 30) in opposition to Appellee's motion to dismiss the appeal improvidently awarded or untimely granted, said, "Had that motion been sustained by this Court, then the filing of the supersedeas bond and the $25,000 premium therefor would have been a useless gesture on the part of Appellant. We submit that the time within which the supersedeas bond could be entered into should and must be automatically extended until such time as the Court has disposed of that motion, because otherwise the Appellant would have been required to do a useless and very expensive thing." The bond is for the protection of the Appellee. The statutory provisions are (Code 58-5-14): "If a supersedeas be awarded, to abide by and perform the judgment, decree or order of affirmance, and to pay to the opposite party, and to any person injured all such costs and damages as they, or either of them, may incur or sustain by reason of said appeal, in case such judgment, decree or order, or such part, be affirmed, *or the appeal, writ of error or supersedeas be dismissed.*" (Italics ours). The bond required by the Court and the statute was to protect the Appellee if the appeal should be dismissed, as well as if the order of the trial court should be affirmed. Appellee's motion made on No-

vember 28, 1967, to dismiss the appeal for failure to give the required bond was not made until after the elapse of the statutory time within which to file it. The evident purpose of Appellant in not furnishing the appeal bond within the 8 days from November 3 to November 11, 1967, was to save the alleged bond premium of $25,000.00, and furnish to Appellee no bond to which he could have recourse for his damages if the appeal was dismissed. It may have been a useless thing for the Appellant, although required by the statute, but it was important and useful for the Appellee to secure the payment of his damages if the appeal was dismissed. To extend the time for the giving of the bond until the Court passed on the motion to dismiss the appeal and give it only if the appeal be not dismissed, and not give it if dismissed, would be to perpetrate a hoax on the Appellee. Any appellant should be estopped from such course of conduct.

3. Appellant's contention that the trial court did not properly interpret Section 428 of the Restatement of the Law of Torts does not involve or present a question under the Federal Constitution on this appeal as it was not passed upon by the Supreme Court of Appeals of West Virginia. Nowhere in the petition filed by Appellant in the Supreme Court of Appeals of West Virginia is the violation of the Constitution of West Virginia or the Constitution of the United States raised. See Appendix, p. 4(a)-5(a). Nor does its brief filed with the petition on June 27, 1967, raise or mention such violation.

ARGUMENT

The Constitution of West Virginia does not define the procedure for appeal from a circuit court to the Supreme Court of Appeals. The authority to do so has been left to the Legislature. Michie's West Virginia Code, Chapter 58. *State* v. *Legg*, 151 W. Va. 401, 151 S. E. 2d 215 (1966).

Likewise, the Constitution of the United States does not define the procedure for appeals to the Supreme Court of the United States. The authority to do so has been left to the Congress and the Court under its rule making power. 28 U.S.C.A. Supreme Court Rules. 28 U.S.C.A. Federal Rules of Civil Procedure.

In West Virginia, there is no appeal to the Supreme Court of Appeals of West Virginia as a matter of right. A petition for appeal may be filed ex parte with oral argument and supporting brief. If the petition is granted, and was presented within the time required, and the bond as required is given within the time required, the alleged errors are then reviewed by the Court after oral arguments by both parties are heard and printed briefs of both parties have been filed with the Court. The Court, thereafter, either sustains the opinion of the court from which the appeal is taken, or reverses it, in whole or in part.

An appeal may be granted with or without supersedeas. If it is granted *without supersedeas*, the bond required is for costs only, but if it is granted *with supersedeas*, then the bond is to pay the opposite party, appellee, and to any person injured, all such costs and

damages as they, or either of them, may incur or sustain by reason of said appeal in case the judgment, or such part thereof, be affirmed, or the appeal or supersedeas be dismissed, and also, to pay all damages, costs and fees which may be awarded against or incurred by appellant. (Chapter 58, Article 5, Section 14).

The giving of the bond required by the court in its order granting the appeal must be given within two months from the date the appeal is awarded. This is a mandatory provision of the statute of West Virginia, Chapter 58, Article 5, Section 16, and by the Rules of the Supreme Court of West Virginia, Rule III, Section 3. The application for the appeal must be applied for within the statutory time allowed for such appeal to be made. Both provisions are in the same statute (58-5-16).

Appellant contends in its Jurisdictional Statement (p. 9) that the action of the Supreme Court of West Virginia by its order of May 20, 1968, violated both the "Constitution of the State of West Virginia, Article 3, Section 10, providing as follows: 'No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers.' And the Constitution of the United States, Amendment XIV, providing as follows: '* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' "

Due process of law and equal protection of the laws were fully afforded the Appellant, but the Appellant did not avail itself of the protection of the laws for it did not file the required bond within the time required by the statute, Rules of Court and the Court order to secure that protection. Procedural statutes for the orderly administration of the courts are in the interest of justice for all litigants, plaintiffs and defendants alike. The same statutes and rules which apply to all litigants likewise apply to the Appellant here. Appellant did not have an appeal as a matter of right, but only as a matter of error in the trial court. To secure the right to be heard on appeal, Appellant had the duty and obligation to make its application for appeal timely, and to give the bond required within the time required to have the merits of its appeal passed upon by the Court. This, Appellant failed to do. The Supreme Court of West Virginia did not deprive the Appellant of any rights under either the Constitution of West Virginia or the United States. If, in fact, any rights were lost to the Appellant, it was the result of the Appellant's failure to do the things required of it to be done to secure those rights. The merits, if any there were, in Appellant's appeal were never passed on and decided for proper procedural prerequisites had not been taken by Appellant. If the appeal of Appellant had been taken in proper time and proper bond given in time, the Supreme Court of West Virginia would have passed on all questions presented to it. In legal effect, however, the case stands as though no appeal had been prosecuted from the judgment rendered by the trial court. The jurisdiction of the United States Supreme Court is to review the judgments and de-

crees of state courts when a federal question is presented and is limited to the review of a final judgment or decree, actually or constructively deciding such question, when rendered by the highest court of a state in which a decision in a suit could be had; and, as for want of proper appeal, no final judgment or decree of such court has been rendered, it results that the statutory prerequisite for the exercise in this case of the reviewing power by the Supreme Court of the United States is wanting.

A case in the Supreme Court of the United States, although certiorari has been granted, will be subsequently dismissed when the lack of jurisdiction is subsequently called to the Court's attention. The Court's inadvertent allowance of a writ of certiorari does not establish jurisdiction.*

Under Federal Rules and Procedure (Federal Rules of Civil Procedure, Rule 73(a)), the filing of a notice of appeal within the time is mandatory and jurisdictional and prescribed time cannot be extended by waiver or order of court and the right to appeal is lost if notice of appeal is not filed within the time prescribed.**

In *Boggs* v. *Settle*, 150 W. Va. 330, pt. 1 syl., 145 S. E. 2d 446 (1965), the West Virginia Supreme Court held:

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*Montgomery Bldg. & Const. Trades Council v. Ledbetter Erection Co., Ala. 1952, 73 S. Ct. 196, 344 U. S. 178, 97 L. ed. 204. Hartford Life Ins. Co. v. Johnson, Mo. 1919, 39 S. Ct. 336, 249 U. S. 490, 63 L. ed. 722.

**Deena Products Co. v. United Brick & Clay Workers of America, C. A. 6th 1952, 195 F. 2d 612. Certiorari denied. 73 S. Ct. 21, 344 U. S. 822, 97 L. ed. 640.

> "The requirement of Rule 59 (b) of the Rules of Civil Procedure that a motion for a new trial shall be served not later than ten days after entry of the judgment is mandatory and jurisdictional. The time required for service of such a motion cannot be extended by the court or by the parties."

Time within which to appeal and give the required bond, whether for costs or costs and supersedeas, under the West Virginia statute and the Rules of the Supreme Court is likewise procedural and jurisdictional and cannot be waived. *Scott* v. *Coal & Coke Railway Co.*, 70 W. Va. 777, 74 S. E. 992.

Appellant relies on Rule IV, Section 2 of the West Virginia Supreme Court (page 18 of Appellant's Jurisdictional Statement) as authority by which that Court should have allowed it additional time to file its bond as required by that Court in its order of September 11, 1967. It will be noted that any action by the Court under that Rule is to be done "*in its discretion*" and "for cause shown". (Italics ours). The Court is not *required* to act on any matter brought before it under this provision but *may* act and then only in its *discretion* and for good *cause shown*. The refusal of the Court under this section to permit the Appellant to file its supersedeas bond after the time for so doing under its prior order of September 11, 1967, does not raise a constitutional question reviewable by the Supreme Court of the United States.

Glidden Co. v. *Aetna Casualty Co.*, 291 S. W. 2d 315 (1956), was an action by materialmen against a surety on the bond furnished by the contractor. The lower court held for the materialmen and the surety

appealed. The necessary appeal bond had to be filed on October 29th. Due to the early closing of the office the respondent was unable to file the bond on that date. The Court held, page 318:

> "The use of diligence to file the bond within the prescribed period, and the reasons for failure to do so, would be material considerations *if* compliance with the rule could be waived or excused or if the time of filing might be extended. It is well settled, however, that the requirement that the bond be filed within 30 days is mandatory and jurisdictional, and that the time prescribed cannot be dispensed with or enlarged by the courts for any reason."

Thus, the Court held the late filing of the bond was fatal to its jurisdiction.

We respectfully submit that the application for appeal in Appellant's Jurisdictional Statement should be denied, or, the judgment of the Supreme Court of Appeals of West Virginia complained of should be affirmed.

Respectfully submitted,

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